Association for Retarded Citizens Employees Union, NYSUT, AFT (AFL–CIO) *and* New York State Association for Retarded Children, Inc., Niagara County Chapter, d/b/a Opportunities Unlimited of Niagara. Case 3–CB–6109

January 26, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Upon a charge filed by New York State Association for Retarded Children, Inc., Niagara County Chapter, d/b/a Opportunities Unlimited of Niagara (the Employer or Opportunities Unlimited of Niagara) on June 8, 1992,[1] the General Counsel of the National Labor Relations Board issued a complaint on July 31 against the Respondent, Association For Retarded Citizens Employees Union, NYSUT, AFT (AFL–CIO) (the Respondent or the Union), alleging that it had engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the National Labor Relations Act. Copies of the complaint and notice of hearing were served on the Respondent and the Charging Party. The Respondent filed a timely answer denying the commission of any unfair labor practices.

On December 11, the Charging Party, the Respondent, and the General Counsel filed a motion to transfer proceeding to the Board and a stipulation of facts. They agreed that the charge and the affidavit of service of the charge, complaint and notice of hearing and affidavit of service of the complaint, answer and affidavit of service of the answer, and the stipulation of facts with attached exhibits, constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties. The parties waived a hearing, the making of findings of fact and conclusions of law by an administrative law judge, and the issuance of a decision by an administrative law judge. On February 11, 1993, the Deputy Executive Secretary, by direction of the Board, issued an order granting the motion, approving the stipulation, and transferring the proceeding to the Board. The Charging Party and the General Counsel thereafter filed briefs.

On the entire record in the case, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, Opportunities Unlimited of Niagara, a not-for-profit corporation with an office and place of business in Niagara Falls, New York, and eight other locations in Niagara County, New York, is engaged in providing habilitative and rehabilitative services to mentally retarded persons in Niagara County, New York. The Employer, in the course and conduct of its business operations, derives gross revenues in excess of $250,000, and has purchased and received at its Niagara County facilities goods and materials valued in excess of $50,000 directly from places located outside the State of New York. We find that Opportunities Unlimited of Niagara is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The issues presented are whether the Respondent violated Section 8(b)(1)(A) of the Act by: (1) failing to notify nonmember unit employees of their *Beck*[2] rights; (2) informing nonmember employees that they are required, under threat of discharge and as a condition of employment, to join the Union and sign a dues-checkoff authorization form; and (3) maintaining an unlawful union-security clause.

A. Facts

Since February 1989, the Respondent has been the designated exclusive collective-bargaining representative of the unit employees employed at the Employer's facilities in Niagara County, New York. The Respondent and the Employer have been parties to successive collective-bargaining agreements, the most recent of which is effective from February 25, 1992, to February 24, 1995. The collective-bargaining agreement contains a union-security clause.

The parties have stipulated that since about May 6, 1992, the Respondent has failed to provide notice to nonmember unit employees of their rights under *Beck* to object to joining the Union and to paying dues for nonrepresentational activities. The parties have further stipulated that about June 4, 1992, the Respondent hand delivered a letter to nonmember unit employees requiring, under threat of discharge and as a condition of employment, that nonmember employees join the Union and submit dues-checkoff forms.

B. Contentions of the Parties[3]

1. The General Counsel

The General Counsel argues that a union's duty of fair representation and the Supreme Court's decision in *Chicago Teachers Union Local 1 v. Hudson*[4] require that a union, when it seeks to require employees to pay dues and fees under a union-security clause, notify nonmember unit employees of their rights under *Beck*. The General Counsel asserts that such notice is necessary to permit employees to make an informed decision with respect to the exercise of their *Beck* rights. The General Counsel further asserts that the Respondent violated long-standing Board precedent when it threatened em-

[1] All dates are in 1992 unless otherwise noted.

[2] *Communications Workers v. Beck*, 487 U.S. 735 (1988).

[3] The Respondent did not file a brief.

[4] 475 U.S. 292 (1986).

ployees that they would be discharged unless they joined the Union and signed a dues-checkoff authorization form. The General Counsel additionally argues that the Respondent's maintenance of its union-security clause is unlawful because the clause requires that employees maintain membership in good standing. The General Counsel reasons that the clause may mislead employees to believe that actual membership in the Union is required, rather than the payment of periodic dues and fees, in contravention of the Supreme Court's decision in *NLRB v. General Motors Corp.,* 373 U.S. 734 (1963).

2. The Employer

The Employer asserts that the Respondent, in its letter distributed to employees on June 4, failed to inform employees of their *Beck* rights, and further failed to inform them of their rights under *General Motors* to refrain from union membership and to be required only to pay the equivalent of union dues. The Employer argues that the Respondent violated Section 8(b)(1)(A) of the Act by failing to inform employees of these rights, and by threatening employees with discharge unless they joined the Union and signed a dues-checkoff authorization form. The Employer further argues that the parties' union-security clause is unlawful because it does not reflect the right of employees under *General Motors* to refrain from union membership.

C. Discussion

In *Communications Workers v. Beck*, supra, the Supreme Court held that the National Labor Relations Act does not permit a collective-bargaining representative, over the objection of dues-paying nonmember employees, to expend funds collected under a union-security agreement on activities unrelated to collective-bargaining, contract administration, or grievance adjustment.[5] In *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang v. NLRB*, 525 U.S. 813 (1998), the Board found that the union violated its duty of fair representation by failing to provide notice of *Beck* rights to unit employees covered by a union-security agreement who were not members of the union. The Board held that:

> [W]hen or before a union seeks to obligate an employee to pay fees and dues under a union-security clause, the union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.[6]

The Board further clarified that if a nonmember employee chooses to file a *Beck* objection, the employee must be apprised of the following additional information by the union: the percentage of the reduction in fees for objecting nonmembers, the basis for the union's calculation, and the right to challenge these figures.[7] The purpose for providing objectors with this additional information is to allow an employee to decide whether there is any reason to mount a challenge to the union's dues-reduction calculations.[8]

The Board explained that these notice requirements furnish significant protection to the interests of the individual nonmember unit employee vis-à-vis *Beck* rights, without compromising the countervailing collective interests of bargaining unit employees in ensuring that every unit employee contributes to the cost of collective bargaining. The Board further emphasized that a union is afforded a wide range of reasonableness under the duty of fair representation in satisfying its notice obligation.[9] A union meets its notice obligation as long as it has taken reasonable steps to ensure that all employees whom the union seeks to obligate to pay dues under a union-security clause are given notice of their *Beck* rights.[10]

The parties' stipulation establishes that when the Respondent directed nonmember employees by its letter of June 4 to join the Union and sign a dues-checkoff authorization, and thereby sought to obligate them to pay fees and dues under the union-security clause, the Respondent failed concomitantly to notify these nonmember employees of their *Beck* rights. The Respondent accordingly failed to comply with the rule set forth in *California Saw & Knife Works* requiring that *Beck* notice be given to an employee when or before a union seeks to obligate that employee to pay fees and dues under a union-security clause, and accordingly violated Section 8(b)(1)(A) of the Act. 320 NLRB at 233.

The parties' stipulation further establishes that the Respondent, by its June 4 letter, required that nonmember employees, under threat of discharge and as a condition of employment, join the Union and submit dues-checkoff forms. The Board has long held that a union violates Section 8(b)(1)(A) of the Act by threatening employees with discharge unless they join the union and execute a dues-checkoff authorization form. *Hampton Merchants Assn.,* 151 NLRB 1307, 1308 (1965); *Boilermakers Local 374 (Combustion Engineering)*, 284 NLRB 1382, 1390 (1987), enfd. 852 F.2d 1353 (D.C. Cir. 1988); *Paperworkers Local 710 (Stone Container)*, 308 NLRB 95

[5] 487 U.S. at 752–754.

[6] *California Saw & Knife Works*, supra, 320 NLRB at 233.

[7] Id.

[8] Id., 320 NLRB at 239-240.

[9] Id., 320 NLRB at 235.

[10] Id., 320 NLRB at 233.

(1992). We accordingly find that the Respondent violated Section 8(b)(1)(A) by communicating such a threat to nonmember unit employees in its letter of June 4.

Finally, we address the complaint allegation that the Respondent violated Section 8(b)(1)(A) of the Act by maintaining a union-security clause in its collective-bargaining agreement with the Employer. The General Counsel and the Employer argue that the union-security clause, which requires that employees become and remain members in good standing in the Union, is unlawful on its face.[11] They argue that the maintenance of a union-security clause is unlawful, unless the clause expressly explains the Supreme Court's interpretation of Section 8(a)(3) of the Act. In *NLRB v. General Motors Corp.,* supra, 373 U.S. 734, the Court held that under Section 8(a)(3) the only "membership" that a union can require is the payment of fees and dues, and thus that the membership that may be required "as a condition of employment is whittled down to its financial core." Id. at 742.

The Supreme Court by unanimous decision in *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998), recently rejected the argument presented here asserting the facial invalidity of the union-security clause. The Court in *Marquez* explained that Section 8(a)(3) of the Act permits unions and employers to negotiate an agreement that requires union "membership" as a condition of employment for all employees.[12] The Court held that a union does not breach "its duty of fair representation when it negotiates a union security clause that tracks the language of Section 8(a)(3) without explaining, in the agreement, this Court's interpretation of that language."[13] The Court clarified that by tracking the statutory "membership" language, a union-security clause incorporates all of the refinements and rights that have become associated with the language of Section 8(a)(3) under *General Motors* and *Beck*. We accordingly find, in light of the Supreme Court's pronouncement in *Marquez*, that the complaint allegation here that the Respondent maintained an unlawful union-security clause is without merit, because the clause at issue tracks the "membership" language of Section 8(a)(3) of the Act. For these reasons we shall dismiss the complaint allegation.

CONCLUSIONS OF LAW

1. New York State Association for Retarded Children, Inc., Niagara County Chapter, d/b/a Opportunities Unlimited of Niagara is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Association for Retarded Citizens Employees Union, NYSUT, AFT (AFL–CIO) is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act: by failing to notify nonmember unit employees of their *Beck* rights at the time it sought to obligate them to pay fees and dues under the union-security clause; and by threatening nonmember employees with discharge unless they became members of the Union and signed dues-checkoff authorization forms.

4. The Respondent has not otherwise violated the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In accordance with *California Saw*, we shall order the Respondent to notify all bargaining unit employees of their rights under *Beck* and *General Motors*. The *Beck* notice shall contain sufficient information, for each accounting period covered by the complaint, to enable those employees to decide intelligently whether to object. See, e.g., *California Saw*, supra, 320 NLRB at 253. With respect to those employees whom the Respondent initially sought to obligate to pay dues or fees under the union-security clause on or after May 6, 1992, who with reasonable promptness after receiving their notices, elect nonmember status and make *Beck* objections with respect to one or more of the accounting periods covered by the complaint, we shall order the Respondent, in the compliance stage of the proceeding, to process their objections, nunc pro tunc, as it

[11] The union-security clause provides, in pertinent part:

> The Agency agrees, as a condition of employment . . . that all employees covered by this Agreement shall become members of the Union within thirty (30) calendar days of the effective date of this Agreement and as a condition of employment maintain their membership in the Union in good standing; all new members covered by this Agreement shall become members in good standing within thirty (30) calendar days from the date they first commenced work. . . . Refusal of an employee to comply with [this provision] shall be considered by the parties as just cause for discharge.

[12] Sec. 8(a)(3) provides in pertinent part:—

It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

[13] Id., 320 NLRB at 2240.

would otherwise have done, in accordance with the principles of *California Saw*. The Respondent shall then be required to reimburse the objecting nonmember employees for the reduction in their dues and fees, if any, for nonrepresentational activities that occurred during the accounting period or periods covered by the complaint in which they have objected.[14] Interest on the amount of proportionate back dues and fees owed to objectors shall be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Association For Retarded Citizens Employees Union, NYSUT, AFT (AFL–CIO), Niagara Falls, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees with discharge if they do not become members of the Union and sign dues-checkoff authorization forms.

(b) Failing to notify nonmember unit employees of their *Beck* and *General Motors* rights when it first seeks to obligate them to pay fees and dues under a union-security clause.

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Notify all bargaining unit employees in writing of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), including that they have the right to be or remain nonmembers and that nonmembers have the right to object to paying for union activities not germane to the union's duties as bargaining agent, and to obtain a reduction in fees for such activities. In addition, this notice must include sufficient information to enable the employee to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections.

(b) Process the objections of nonmember bargaining unit employees whom the Respondent initially sought to obligate to pay dues or fees under the union-security clause on or after May 6, 1992, in the manner prescribed in the remedy section of this decision.

(c) Reimburse with interest nonmember bargaining unit employees who file objections under *Communications Workers v. Beck*, supra, with the Respondent for any dues and fees exacted from them for nonrepresentational activities, in the manner prescribed in the remedy section of this decision.

(d) Within 14 days after service by the Region, post at its business office and meeting hall copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, concurring.

In *Marquez v. Screen Actors Guild,* 525 U.S. 813 (1998), the Supreme Court held that maintenance of a union-security clause which tracks the language of the National Labor Relations Act (NLRA) does not breach a union's duty of fair representation. As the concurrence makes clear, the Court did *not* decide whether such a clause is a violation of the NLRA. 119 S.Ct. at 304. However, in the NLRA cases involving these types of issues, the Board has applied the principles of the duty of fair representation.[16] Thus, under current Board law, there is no basis for finding a violation of the NLRA.

I recognize that the clause herein reads in terms of "membership *in good standing*" (emphasis added). This language goes beyond the wording of the statute. However, the clause in *Marquez* also had "good standing" language. Further, the General Counsel does not argue that this language warrants a different result, and he does not point to any constitutional provisions or bylaws under which "good standing" is defined in ways that go beyond the payment of dues and fees. Accordingly, I do

[14] The General Counsel alleged, and the parties stipulated, that the Respondent has not given *Beck* or *General Motors* notice to employees since on or about May 6, 1992. Because the complaint allegation focuses on events that happened after that date, we shall confine the reimbursement remedy to employees who were initially subjected to union security on or after May 6, 1992. On the other hand, we shall order the Respondent to give notices to all bargaining unit employees irrespective of when they were initially subjected to union security. This remedial action is required by *California Saw* and the Board's companion decision in *Paperworkers Local 1033 (Weyerhaeuser Paper Co.*), 320 NLRB 349 (1995), revd. on other grounds sub nom. *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated 525 U.S. 979 (1998). It is designed to ensure that all unit employees will have knowledge of their rights, for future exercise if they wish. The class to which notice is required is broader than the class for which make-whole relief is provided, consistent with the distinction normally made in Board practice between the obligation of an unfair labor practice violator to make whole victims of proven unfair labor practices and the violator's obligation to notify employees of the rights that were violated. *Teamsters Local 435 (Beverage Distribution Corp.),* 327 NLRB No. 87, slip op. at 4 fn. 16 (Jan. 26, 1999).

[15] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[16] See *California Saw & Knife Works*, 320 NLRB 224 (1995).

not pass on issues that would be raised if there were such a contention and showing.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees with discharge if they do not become members of the Union and sign dues-checkoff authorization forms.

WE WILL NOT fail to notify employees of their *Beck* rights when we first seek to obligate them to pay fees and dues under a union-security clause.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL notify all bargaining unit employees in writing of their rights under *Communications Workers v. Beck*, 487 U.S. 735 (1988), including that they have the right to be or remain nonmembers and that nonmembers have the right to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities. In addition, this notice will include sufficient information to enable the employee to intelligently decide whether to object, as well as a description of any internal union procedures for filing objections.

WE WILL process the *Beck* objections of nonmember bargaining unit employees whom we initially sought to obligate to pay dues or fees under the union-security clause on or after May 6, 1992.

WE WILL reimburse with interest nonmember bargaining unit employees who file objections under *Communications Workers v. Beck*, 487 U.S. 735 (1988), with us for any dues and fees exacted from them for nonrepresentational activities for each accounting period since May 6, 1992.

ASSOCIATION FOR RETARDED CITIZENS EMPLOYEES UNION, NYSUT, AFT (AFL–CIO)